BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The Opinion.

The opinion rendered in this cause by the Circuit Court of Appeals for the Seventh Circuit is set forth in full at pages 1100 to 1104 of the transcript, and is reported in Volume 146 of the Federal Reporter, second series, at page 671 (*Stonesifer* v. *Swanson,* 146 F. 2d 671).

Jurisdiction.

The judgment sought to have reviewed was entered by the court of appeals on January 4, 1945, and a rehearing in that court was denied February 19, 1945. This application is made within the statutory period of three months thereafter.

A full statement of the jurisdictional basis is set out in the petition proper.

Statement of the Case.

The deceased, Lillian Swanson, died testate December 4, 1941, leaving a substantial estate. She was survived by her three daughters, Edna, Edith and Ruth, and by their stepfather, Carl Swanson. A year before her death the deceased had conveyed an apartment building to Edna and Edith, and shortly prior to her decease she made them a gift of $17,000 in cash. By her will decedent bequeathed the rest of her property to Edna and Edith. She left a letter in her safe deposit box explaining the division of her personal property between Edna and Edith and her

disinheritance of Ruth, and describing her arrangements with their stepfather as to certain property.

Immediately after his wife's death, Carl Swanson informed his stepdaughters Edna and Edith that he and their mother had an understanding that each would relinquish all claims to the other's property in order that their respective estates would go to their children free of the dower interest of the other. Swanson insisted, however, under threat of a repudiation of his agreement with their mother, that Edna and Edith retain his attorney, George Anderson, to handle their mother's estate.

Thus persuaded, Swanson's stepdaughters retained Anderson to represent them. Swanson's lawyer thereupon advised Edna and Edith that their stepfather's agreement with the deceased could not be enforced because it was not in writing. Anderson further advised Swanson's stepdaughters that the conveyance by their mother of the apartment building was legally defective and that her gift to them of the $17,000 in cash was invalid.

On the strength of these representations, Anderson procured a contract from Edna and Edith stipulating that the apartment building and the $17,000 were to be turned over to the executor as assets of their mother's estate, and that the estate properties were then to be divided between Swanson, the stepfather, and all three daughters. A further provision of the agreement obtained by Anderson called for an outright gift from Edna and Edith of their half interest in a twelve flat building to their stepfather.

After signing the contract but before its performance, Swanson's stepdaughters consulted an attorney of their own choosing and were advised for the first time as to the

fraudulent character of the agreement. Petitioners promptly filed their complaint in the District Court asking a rescission of the contract between them and their stepfather.

By their complaint, petitioners charged Swanson with fraudulently procuring the settlement agreement through misrepresentations and deceit and by virtue of his fiduciary relationship with them; petitioners further alleged that the contract was brought about through a conspiracy between Swanson, Anderson and Ruth to cheat and defraud them. In a separate count it was averred that there was no consideration to support the agreement.

After issue joined, the cause was referred to a master in chancery for hearing and determination. At the trial the master ruled that the plaintiffs bore the burden of proving their charges of fraud against Swanson, Anderson and Ruth, and of establishing the failure of consideration. In attempting to discharge the onus thus cast upon them, petitioners offered in evidence their mother's letter found by Anderson in her safe deposit box, and also testimony to establish the $17,000 gift. The master excluded the offered proof in each instance. Then, after denying the admission of this evidence, the master ruled that the burden of proof being upon the plaintiffs their complaint should be dismissed for lack of sufficient evidence before him. The master's rulings and recommendations were approved by the chancellor, and a decree was rendered dismissing the cause for want of equity at plaintiff's costs.

Petitioners prosecuted an appeal to the Circuit Court of Appeals for the Seventh Circuit contending that the cause should be reversed because: (1) the master and chancellor erroneously threw the burden of proof upon the plaintiffs instead of the defendants as required by the Illinois law; (2) there was abundant evidence in the record to

sustain the charges of fraud and lack of consideration; (3) the trial court should have admitted the decedent's letter into evidence and should have accepted the proof offered to establish the $17,000 gift.

The court of appeals affirmed the decree, even though holding that the record would have supported a finding in favor of plaintiffs as to their stepfather, Swanson. Its explanation for such extraordinary action was that this appeal was not a trial *de novo* and the court could not review the evidence but was bound by the findings of the master.

Despite the several assignments of error properly presented upon the record, and argued before the reviewing court, it is recited in the opinion below that there was only one contention made by appellants: that the agreement should be rescinded because reached through breach of fiduciary relationships.

In its determination of this cause, the court of appeals refused to notice or consider in any way the claim advanced by the appellants that there was no consideration to support the contract. The court also completely ignored the assignments made that reversible error was committed in excluding the decedent's letter and in rejecting the proof offered to establish the $17,000 gift.

Errors Relied On.

I.

The court of appeals erred in holding that it could not examine or weigh the evidence but was bound by the trial court's findings of fact upon appeal from a proceeding in equity.

II.

The court of appeals erred in declining to follow the applicable Illinois law placing the burden of proof upon the defendants and in upholding the trial court's ruling that the plaintiffs must sustain the burden of proof.

III.

The court of appeals erred in affirming the judgment without examining or noticing assignments of reversible error properly presented for determination by the appellants.

ARGUMENT.

May It Please the Court:

A.

An Appeal In Equity Brings Before The Reviewing Court The Whole Record And The Appellate Court Is Required To Examine The Evidence And Try The Case De Novo.

One of the five errors assigned upon this record for a reversal of the decree is as follows (R.1078):

> "The chancellor erred in finding that the material allegations of the complaint were not sustained."

Perhaps the most important factual issue upon the trial involved the $17,000 gift. As to this question the court of appeals stated in its opinion:

> "The master found there was not sufficient evidence to establsh a valid gift at this time to Edna and Edith
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> . . .
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> "There is a conflict in the evidence as to the condition of her mother at the time she gave the direction to Edith to go to the bank and take this money and divide it with her sister Edna. A witness for defendants testified that while her mother was in a coma, Edith, on her own impulse and to save the estate from possible tax, went to the bank and withdrew the money. On the other hand, Edith testified that she acted under her mother's direction, *and the surrounding circumstances strongly support her statement.*" (Italics supplied.)

Another vital issue at the trial concerned the presence or absence of consideration to support the contract. The

recited consideration for the settlement was that Ruth "agrees not to contest the validity of said will" (R. 23). Plaintiffs claimed that there was no foundation for Ruth to contest her mother's will, and as stated in Ruling Case Law (vol. 28, wills, sec. 397, p. 391):

> "If there is no doubt of the validity of the will, a promise to forbear contesting it is not a valuable consideration."

Relative to this point, the court of appeals in its opinion said:

> "As to the sister, Ruth . . . she had been disinherited and she threatened to contest the admission of her mother's will. *It is rather clear that there was not much support, if any, for her contest.*"

Then, with reference to our general assignment that the trial court was in error in finding that the complaint should be dismissed for failure of proof, the court of appeals held:

> "As to Swanson, the stepfather, . . . we think a finding in favor of the plaintiffs as to him would have been supported by the evidence."

Nevertheless, in the face of its findings that the surrounding circumstances strongly supported plaintiffs' claims, and that there was no substance to the consideration relied on to sustain the contract, and that the complaint had been proved as to the stepfather and principal defendant, the court of appeals refused to reverse the judgment. Its explanation for this extraordinary result is that it was powerless to weigh the evidence on appeal and was bound by the findings of the trial court. In this respect the court said:

> "This is not a trial *de novo*. The respect which we entertain for findings made by the trier of facts, who has had the opportunity of seeing and hearing the parties, makes it impossible for us to disturb the findings here made."

On this identical question, as to the scope and extent of the appellate court's reviewing power in an equity appeal, the Circuit Court of Appeals for the Eighth Circuit decided exactly to the contrary. In *Aro Equipment Corp.* v. *Herring-Wissler Co.*, 84 F. 2d 619, the Eighth Circuit held (p. 621):

> "An appeal in equity brings before the appellate court the whole record, and the Court is required to examine the record and try the case *de novo*. The findings of the trial court, while entitled to great weight, may be adopted or discarded by the appellate court even though supported by substantial evidence."

In an earlier decision, the Sixth Circuit determined this point in the following manner (*Laursen* v. *Lowe*, 46 F. 2d 303, 304):

> "In an equity appeal the obligation is imposed upon this court of reviewing the record, *weighing the evidence*, and determining as best we may whether the plaintiff has sustained the burden of proof resting upon him." (Italics supplied.)

Which Circuit has pronounced the correct rule in respect of this important right of review? We think the Eighth and Sixth Circuits are right and that the Seventh Circuit is wrong. In any case, this conflict of decisions between the Circuits should be resolved by granting a consideration of this record, and the resulting impairment of uniform decision adjusted and removed.

B.

Burden Of Proof Is A Substantive Rather Than Procedural Right And Governed By State Rather Than Federal Law.

This action was a suit in equity to rescind an executory contract for fraud and failure of consideration. The complaint charged that the defendants occupied fiduciary re-

lationships with the plaintiffs, and that the settlement agreement was procured by the fiduciaries for their own benefit.

In this connection the court of appeals stated:

> "It is plaintiffs' contention that the settlement agreement should be set aside because it was reached through a breach of fiduciary relationships which existed between the executor, the stepfather and the attorney for the executor, and the two daughters who allegedly suffered by this agreement . . . We accept for the purpose of this argument the plaintiffs' theory that there existed a fiduciary relationship between the stepfather and the daughters; also, between the executor, the executor's attorney, and the legatees, the two daughters."

The established law of Illinois applicable to such a proceeding casts the burden of proof upon the defendants to show an absence of fraud on their part by clear and convincing evidence. In the case of *Kosakowski* v. *Bagdon*, 369 Ill. 252, a leading decision on the subject, the Illinois Supreme Court laid down the following rule (p. 254):

> "The law seems well settled in this State that where relations of trust and confidence exist between parties to a transaction and the party receiving the transfer is thereby benefited, the court will indulge in the presumption that the party making the transfer was unduly influenced, and such presumption will prevail until it is rebutted by the party benefited . . . The doctrine repeatedly announced is that courts of equity will scrutinize with the most jealous vigilance transactions between parties occupying fiduciary relations toward each other, and that the burden of proof is on the beneficiary, in such a case, to establish the fairness of the transaction, and to show that it did not proceed from undue influence . . . We have often held that where a fiduciary relation exists and gives cause for suspicion, it is not necessary to prove actual fraud in order to vitiate a questioned action."

To the same effect see the following decisions handed down by the Illinois Supreme Court at its September, 1944, term: *Le Blanc* v. *Atkins*, 387 Ill. 360, 366-367; *Vrooman* v. *Hawbaker*, 387 Ill. 428, 435; *Burroughs* v. *Mefford*, 387 Ill. 461, 465.

The master in chancery refused to follow the Illinois practice but applied the Federal rule, that the party asserting the affirmative of an issue has the burden of proving it (*Florida Fruit Canners* v. *Walker*, 90 F. 2d 753, 758; *Tucker* v. *Traylor Co.*, 48 F. 2d 783, 786). The burden of proving the fraud charged in the complaint was thus thrown upon the party asserting it. In consequence of this placement of the burden of proof upon plaintiffs, the master found (R. 1036-1038):

> "The allegations set forth in the Bill of Complaint are not supported by adequate proof . . . Plaintiffs have failed to prove a failure of consideration . . . The evidence submitted before me fails to establish either a prenuptial agreement or a postnuptial agreement . . . There is not sufficient evidence to establish a valid gift . . . The evidence fails to establish that Ruth Barre, George F. Anderson and Carl J. Swanson combined and confederated themselves in a scheme to cheat and defraud either plantiffs or any other person or persons of their lawful property . . . The Bill of Complaint should be dismissed for failure of proof of material allegations contained therein."

The chancellor found merely (R. 1058):

> "That the material allegations contained in said complaint have not been proved and are not sustained by the evidence."

Error in this regard was assigned upon the record in the following way (R. 1079, 1082):

> "The chancellor by ratifying, confirming and ap-

> proving the master's report fell into the following errors of the master . . . The master erred in failing to find that Swanson, Anderson and Hammerstrom had not sustained the burden cast upon them in this case to establish the fairness of the transaction and it did not proceed from any influence on their part, and that it was executed by plaintiffs only after obtaining competent, independent advice, and that they failed to vindicate the bargain from any shadow of suspicion and show that it was perfectly fair and reasonable in every respect by clear and convincing proof."

The court of appeals by its opinion sustained the master and chancellor in declining to follow the Illinois law with reference to burden of proof. The reviewing court below said:

> "We are not satisfied that the evidence warrants or justifies our disturbing the findings of the master confirmed as they are by the District Court....We cannot say there was no support for the findings as made."

There can be no doubt that the act of artificially throwing the burden of proof upon one party instead of the other can readily be the turning point in litigation. Outcome of the case at bar can be completely accounted for on that ground. Instead of casting it on the defendants where it belonged, the master placed the burden of proving defendants' fraud on the plaintiffs and then dismissed their complaint for failure to discharge that burden which was not lawfully theirs. This ruling by the master substituting the Federal rule for the State practice was upheld by the chancellor and affirmed by the court of appeals.

Under the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, it would seem that this type of presumption, a creature of law and not of logic, should be regarded as

substantive rather than procedural, and governed by State rather than by Federal law. It has been so declared in at least one circuit court of appeals decision, with respect to sufficiency of proof to raise an inference of negligence and make out a *prima facie* case of liability under the doctrine of *res ipsa loquitur* (*Coca-Cola Bottling Co.* v. *Munn*, 99 F. 2d 190).

Nothing in the new Rules of Civil Procedure indicates an intention to give any direction concerning either presumptions or the burden of proof (*Howard* v. *United States*, 125 F. 2d 986). It would seem, therefore, that the entire field is left to State law.

In *Cities Service Oil Co.* v. *Dunlap*, 308 U. S. 208, this Court was called upon to decide whether a circuit court of appeals had wrongly declined to follow the rule of the Texas courts prescribing how and by whom the facts should be shown where one party to a contest concerning ownership of land claims the legal title as bona fide purchaser. The Texas rule was that burden of proof is upon him who attacks the legal title and asserts a superior equity. The Court there said (p. 210):

> "The District Court ruled in favor of Dunlap. The Circuit Court of Appeals affirmed. In the latter court petitioner maintained that under the established Texas rule, on an issue of *bona fide* purchaser for value without notice, the burden of proof is upon him who attacks the legal title and asserts a superior equity. It cited *White* v. *Hix* (Texas) 104 S. W. 2d 136, and insisted that *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, required observance of the local rule . . .
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> "We cannot accept the view that the question presented was only one of practice in courts of equity. Rather we think it relates to a substantial right upon which the holder of recorded legal title to Texas land

may confidently rely. Petitioner was entitled to the protection afforded by the local rule."

Analogously, the rule of Illinois that in an action against fiduciaries attacking a transaction for fraud the burden of proof devolves upon the defendant to establish the negative of the fraud charged against him, is a substantial right upon which plaintiffs in bringing their action in the case at bar could confidently rely. Plaintiffs were entitled to the protection of the Illinois law, and the lower courts in the instant case wrongfully applied the federal rule requiring him who asserts the affirmative of an issue to sustain the burden of proving it.

This conflict between the ruling by the appellate court below and an applicable holding of this Court ought to justify a review of the record to the end that conformance with a governing Supreme Court decision may be effected.

C.

A Court Of Appeals May Not Affirm A Judgment Without Giving Consideration To Reversible Errors Properly Presented For Review.

After the master ruled that the burden of proof was not upon the defendant fiduciaries but must be sustained by the plaintiffs, petitioners in attempting to discharge the burden thus thrown upon them offered in evidence a letter written by the deceased explaining her disposition of the property involved in this litigation. This document was found by the stepfather's lawyer in decedent's safe deposit vault while handling her estate and is of the highest probative value in establishing the fraud of the fiduciaries. In this connection the following transpired at the trial (R. 734-743):

"Mr. Pomerance: If the Master please, I wish at this time to have exhibit No. 2, which is a letter that was found in the safety deposit box, which I believe your Honor admitted into evidence subject to my objection . . . My motion now is to have that particular letter, which was admitted into evidence, subject to my objection, to have the objection sustained to the letter and have the letter removed as a document in evidence

"The Master: Excluded.

"Mr. Aiken: Entirely?

"The Master: Entirely.

"Mr. Aiken: You mean even though—

"The Master: It is out.

"Mr. Aiken: Even not as being what you admitted it to be in the first place—to show it was a document that George Anderson found in the safety deposit box, which has been referred to by all of these witnesses?

"The Master: That is right."

In this condition of the record the master by his report ruled against the plaintiffs on the following stated ground (R. 1037):

"The evidence *submitted before me* fails to establish either a prenuptial or a postnuptial agreement between Carl J. Swanson and his deceased wife, Lillian F. Swanson."

The District Court approved the Master's ruling and finding (R. 1058), and this disposition was assigned as error in the Circuit Court of Appeals as follows (R. 1079, 1084-1085):

"The chancellor by ratifying, confirming and approving the Master's Report fell into the following errors of the Master, and committed error in adopting the following rulings of the Master:

"The Master committed palpable, manifest and inexcusable error in excluding from the evidence a letter written by decedent to her daughters concerning various transactions in issue and left by her in an en-

velope addressed to her daughters and found by Anderson when he opened the decedent's safe deposit box as attorney for plaintiffs and read by him to the parties and upon which Anderson based much of his advice to the parties (Plaintiffs' Exhibit 2a, b, c—(transcript 184-188; transcript 1429-1447), which offered and excluded letter is as follows:

'September 24, 1940.

'To my daughters Edna, Edith and Ruth

'I wish to make Edna and Edith my heirs. Ruth is out and she has broken my heart, so I feel her choise is to take care of herself, so thats her pick.

'Edna and Edith, you are to divide equally between yourselfs, and its upon to you if you wish to give Ruth anything. The 2 flat is in Ediths name, and you can do as you wish with it but please dont make enemys between yourselfs. I just bought a $5000.00 bond in the 12 flat, so your share is equall with Carl. Have Louis and Harry help you in case anything happens to me. My personal belongings you can do so you please. The piano I want Edith to have.

'I have taken Ruth name off my box so she is out as far as Im concerned. She has hurt me so that I'll never get over it, but girls keep an eye on her so if she needs help be back of her.

'Edith can have my automobile.

'This is awful hard to write this out. I just can't see any other way out at the present. Hope you girls enjoy the little I leave you and be happy with your lovly husbands, my son in laws. Words will never be able to express how I love them. Wish I could say that about Ruth.

'Love Mother' ''

At another point in the proceedings the plaintiffs sought to prove the gift of $17,000 (R. 602-604) which evidence the master rejected (R. 601-602. In his report the master found (R. 1037):

> "*That from the facts and circumstances submitted as evidence before me* concerning the withdrawal of the $17,000 on December 1, 1942, prior to the death of Lillian F. Swanson, *there is not sufficient evidence* to establish a valid gift to Edna F. Stonesifer and Edith B. Slutz."

Again, the District Court upheld the master's ruling (R. 1058). The disposition of this matter in the trial court was assigned as error in the appellate court below in the following manner (R. 1085):

> "The Master committed error in refusing to permit plaintiffs to prove the facts and circumstances surrounding the $17,000. transaction between Edith Slutz and the decedent and in denying plaintiffs' offer of proof by Edith Slutz as follows:
>
> > 'My mother became ill with a kidney infection and complications during the last week of November, 1941, and she telephoned me in Highland Park asking me to come out and stay with her while she was sick, which I did. I stayed with mother constantly, helping out and being with her during her illness. After I had been staying with mother for several days, the doctor decided that her condition was so serious that she should be removed to the hospital. A day or so before mother left for the hospital, she called me to her bedside and told me that she had $17,000. in cash in her safety deposit box from some insurance which my father had left her. Mother said she had always planned for Edna and me to have this money, that she was going to the hospital and she was afraid she was not coming back. She said, "I want to give this $17,000. to you and Edna equally. You already are a deputy and can go into my safety deposit box. The keys to the box are in the back of my dresser drawer. I want you to take the keys and go down to the vault and take the money out of the box right away, and give half of it to Edna and take half of it for yourself."

'A day or so later, on Saturday, November 29, 1941, I went to the bank in accordance with mother's instruction, but the vaults were closed. On the following Monday, December 1, 1941, I returned to the vaults and took the $17,000. in cash out of mother's box. I opened another box in my own name right there in the vault, and I divided the money into two equal shares, placing $8,500. in an envelope on which I marked "Edna," and I took the other half of the cash and placed it in a second envelope upon which I marked "Edith," and I put both envelopes in the safe deposit box which I had opened. Before I left the Continental Bank Building, I decided I ought to stop in and tell my uncle, Louis H. Hammerstrom, who is the Chief Auditor of the Bank, about mother's condition, which I did. While I was there I told Uncle Louie about removing the $17,000. from mother's box.' "

The court of appeals affirmed the decree dismissing plaintiffs' complaint for insufficient evidence without even noticing, much less considering, these errors assigned for reversal (R. 1100-1104).

In its opinion the appellate court below said as to the appellants' contentions merely:

> "Generally and broadly stated it is plaintiffs' contention that the settlement agreement should be set aside because it was reached through a breach of fiduciary relationships which existed between the executor, the stepfather and the attorney for the executor, and the two daughters who allegedly suffered by the agreement."

The reviewing court's grievous oversight was called to its attention thusly by the petition for a rehearing (R. 1128):

> "Your Honors still have not passed upon our contention that the Master committed reversible error in

rejecting as evidence the mother's letter and in excluding Edith's testimony concerning the gift.

"The Master's finding on this point underlines the serious injury to plaintiffs' case which resulted from his erroneous ruling. The Master disposed of the gift question in the following way (R. 1037):

> '*That from the facts and circumstances submitted as evidence before me* concerning the withdrawal of the $17,000 . . . there is not sufficient evidence to establish a valid gift.'

"If the Master had placed the burden where it belonged there would have to be a finding that the gift was not disproved. And if he had not excluded plaintiffs' proof on the subject he would be compelled to find that the gift had been established *by the plaintiff.*"

In *Maryland Casualty Co.* v. *Jones,* 279 U. S. 792, this Court had occasion to pass upon a similar disposition of an appeal in the circuit court of appeals. It was held there that a refusal by the court of appeals to consider the assignments of error relating to rulings at the hearing required a reversal. This Court said (p. 794-796):

> "The court made various rulings adverse to defendant in respect to the admission and exclusion of evidence . . . After the coming in of the report of the special master the court made special findings of fact, upon which it entered judgment against the defendant . . . The defendant filed twenty-one assignments of error. Some of these were directed to . . . the rulings of the court on the admission and rejection of evidence . . . Despite the fact that all of these assignments of error appeared in the record, the Circuit Court of Appeals stated in its opinion that 'all assignments of error are based upon the insufficiency of the testimony to support the special findings' and . . . affirmed the judgment of the District Court without referring to or considering the assignments of error relating to the

> rulings of the Court in the progress of the trial . . . Since on the face of the record the failure of the Circuit Court of Appeals to consider the assignments of error relating to rulings at the hearing is unexplained, and its action appears to have been erroneous, its judgment must be reversed."

As this Court held in the *Maryland Casualty* case, petitioners were substantially deprived of their right of review by the refusal of the court of appeals to consider the rulings in the trial court made during the progress of the hearings, excepted to at the time, and duly presented by the record for determination on appeal.

This radical departure from the usual and accepted course of judicial proceedings in the circuit court of appeals calls for an exercise of this Court's power to supervise the appellate function in the intermediate courts.

Respectfully submitted,

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